

7 Official Opinions of the Compliance Board 125 (2011)

Exceptions – Personnel – Outside Exception – Job description

Exceptions – Personnel – Within Exception – Individual employees – Performance of County Attorney – Legal services proposals

Administrative Function – Within Exception – Deferral of topics to open meeting discussion – budget preparation

Exceptions – Collective Bargaining – Negotiations with unions

Minutes – Closed Session Statement – Failure to Include Description – Inadequate information

April 11, 2011

Complainants:

*Patricia K. McGee
Craig O'Donnell
Kent County News*

Respondent:

Kent County Board of Education

The Open Meetings Compliance Board has consolidated for decision the complaints of Patricia K. McGee and Craig O'Donnell ("Complainants") of the Kent County News that the Kent County Board of Education ("County Board") violated the Open Meetings Act with respect to numerous meetings in 2007, 2009, and 2010. The County Board responded by conceding some violations and denying others.

On February 17, 2011, our counsel held an informal conference, *see* §10-502.5(e) of the State Government Article ("SG"), with the Complainants, the County Board's counsel, and several past and current County Board members. The participants notably discussed the Act's requirements with respect to closing meetings and the limitation of the Board's advisory function to requirements imposed by the Act. The following categories of issues remain open for our consideration:

I. Whether discussions held by the County Board in certain closed sessions in 2009 fell within the scope of the various exceptions stated by the County Board as bases for the closures; and

II. Whether the County Board's summaries of certain closed sessions complied with the Act.

We shall set forth the pertinent facts and contentions in our discussion.

I

Discussion

Under the Open Meetings Act, when a quorum of a public body meets, it must meet in a session open to the public unless the topic of discussion either involves a function excluded from the Act, such as the administrative function, or falls within one of the fourteen exceptions to that requirement. SG §§10-505; 10-503; 10-508. The administrative function exclusion operates to exclude a discussion from the scope of the Act unless the public body has recessed an open meeting in order to exercise the function. SG §10-503(c).¹ In that event, the public body must identify the subject of the discussion in the minutes of its next open meeting. When a public body instead chooses to recess an open meeting to discuss topics excepted by SG §10-508(a), it must identify each applicable exception and then, in the closed session, discuss only matters within the scope of the exceptions it identified. SG §10-508(b).²

This complaint involves both the administrative function exclusion and various exceptions. We shall organize our analysis by meeting date.

A. *The February 2, 2009 meeting.*

Complainants allege that the County Board's discussion of the stated topic of this closed meeting –“ personnel items to be voted on in open session” – could not have occupied the hour the County Board spent in that session

¹ Section 10-503(c) provides:

If a public body recesses an open session to carry out an administrative function in a meeting that is not open to the public, the minutes for the public body's next meeting shall include: (1) a statement of the date, time, place, and persons present at the administrative function meeting; and (2) a phrase or sentence identifying the subject matter discussed at the administrative function meeting.

² Section 10-508(b) provides: “A public body that meets in closed session under this section may not discuss or act on any matter not permitted under subsection (a) of this section.”

because only a routine maternity leave was voted on in the subsequent open session. The County Board acknowledges that the open minutes “lack sufficient detail” and asserts that the topics discussed were “permissible topics for a closed session.” The closed minutes disclose discussions about job descriptions and multiple individual employees. The closed minutes also contain statements that two topics would be addressed in open session and that the next meeting would occur at a certain place and time.

We begin with the principle that discussions at closed meetings must fall within the scope of the exception claimed by the public body in advance. *See* SG §10-508 (b). The County Board invoked the exception for a “personnel matter that affects one or more specific individuals,” *see* SG §10-508(a)(1)(ii), and its discussions about the individual employees fall squarely into that exception. The job description discussions are a different matter. A discussion affecting “anyone in the position” and not bearing on the “job performance or other attributes of the individual employee” does not fall within the exception. 3 *OMCB Opinions* 335, 337 (2003). While we recognize that discussions about a job description might well include comments on an individual’s performance or attributes, the closed minutes in this case do not disclose any such comments. We therefore conclude that the County Board violated the Act by conducting the job-description discussions in a closed session. We turn next to the principle that public bodies may recess an open meeting to perform an administrative function as long as they comply with certain record-keeping requirements. *See* SG §10-503(c).

We have interpreted the administrative function exclusion to permit closed-session discussions of the administrative details involved in applying the Act. 5 *OMCB Opinions* 33, 39 (2006). We therefore agree with the County Board that the assignment of two topics to an open-meeting discussion and the announcement of the logistical arrangements for the next open meeting fell within the exclusion. The fact that the topics were administrative, however, did not mean that no section of the Act applied. Here, because the County Board had recessed an open session to discuss those topics, §10-503(c) required the County Board to “identify the subject matter” in its subsequent open-session minutes. This the County Board did not do. Had the County Board complied with §10-503(c), Complainants might not have wondered why a discussion seemingly about one routine personnel topic took so long.

B. The January, 2009 meetings.

According to its open-session minutes, the County Board held one closed meeting on January 5 to discuss “personnel items” and “legal matters” and another on January 12 to discuss “personnel matters and negotiations.” Complainants allege that the County Board’s stated reason for closing these

meetings was pretextual and that a “different kind of discussion” actually occurred. Complainants submit that “one board member’s desire to rant about the attorney personally does not justify closing a session....” The complainants also allege that the County Board discussed its own salary without disclosing that discussion on the closing statements.

The County Board cannot locate its closed-session minutes for the January meetings, which occurred more than a year before the complaint was filed, and we cannot assess whether all of the topics discussed fell within the exceptions that were invoked. Nonetheless, we can state as a general matter that a public body may invoke the “personnel matters” exception to close a session for the purpose of allowing one member to “rant” about the public body’s attorney. *See 3 OMCB 340, 343 (2003)* (concluding that a discussion about whether to renew attorney’s contract involved a “performance appraisal” and fell within the exception). As explained above, a rant about attorneys generally, without respect to the incumbent’s performance, would not fall within the exception.

With respect to the alleged discussion of the County Board’s own salary, the County Board has conceded that the discussion of their own compensation was not appropriate for an opening session. Indeed, the February 2, 2009 open-session minutes state that the County Board president “corrected Board compensation discussion in open session.” As it appears from those minutes and the closed-session minutes of that date that the County Board itself decided that the topic should have been discussed publicly, we need not discuss the subject further.

Finally, with respect to the County Board’s summaries of its closed meetings, we note the inadequacies of those summaries, the County Board’s agreement with the Complainants in that regard, and the fact that County Board members have since attended Open Meetings Act training conducted by the Maryland Association of Boards of Education. We consider these allegations to have been addressed.

C. The June 8, 2009 meeting.

On June 8, the County Board voted in open session to conduct a closed session, conducted the closed session, and resumed its open session. Upon resuming its open session, the County Board’s President reported that the “Board discussed personnel items to be voted on in open session, negotiations, and contracts.” The County Board belatedly prepared a closing statement³ on

³ The County Board has conceded that it violated the Act by preparing the June 8, 2009 closing statement after it held the session, and the participants at the

this Board's "Form of Statement for Closing a Meeting." On that form, the County Board checked off three statutory exceptions as authority for closing the session: "(1) To discuss; the appointment, employment, ...or performance evaluation of appointees, employees...; or any other personnel matter that affects one or more specific individuals"; "(9) To conduct collective bargaining negotiations or consider matters that relate to the negotiations" ; and "(14) Before a contract is awarded or bids are opened, [to] discuss a matter directly related to a negotiation strategy or the contents of a bid or proposal, if public discussion ...would adversely impact the ability of the public body to participate in the competitive bidding or proposal process." Under "Topics to be discussed," the presiding officer listed "budget negotiations," "personnel items," and "board counsel bios/tenders of interest." Under "reason for closing," the officer stated "To discuss budget negotiations, [illegible] personnel items, and bios for Board counsel contract." The complainants allege, first, that the discussion was "actually a discussion about a budget" and, second, that the status of the County Board's counsel's contract was part of the "mystery" of why the County Board had closed many prior meetings to discuss that counsel.

This Board has reviewed the closed minutes for the June 8, 2009 meeting. The County Board's discussion of multiple proposals to provide legal services fell within both the personnel exception and the exception for discussions related to bids or proposals. The discussion regarding negotiations with unions fell within the exception for topics relating to negotiations. The County Board also discussed "Budget concerns." Those discussions, while not described in detail, appear to have pertained to the preparation of the next year's budget. If so, they likely fell within the administrative function exclusion. *See 2 OMCB Opinions 64, 66 (1999).*

The open session summary of this closed session omits the budget discussion and otherwise refers only to "personnel items to be voted on in open session, negotiations, and contracts." Again, the cryptic nature of this description, especially coupled with its reference to "contracts," may have led to the Complainant's impression that the County Board was discussing matters required to be addressed in the open. The County Board has conceded the inadequacy of its closed-session summaries, and we need not discuss the topic further.

Board's February 17, 2011 conference discussed the level of detail required in closing statements. Accordingly, we need only address here those deficiencies that bear on our discussion of the issues left open.

II

Conclusion

In 2009, the County Board violated the Act by failing to adequately disclose every topic discussed in some closed meetings and by discussing an employment matter that exceeded the narrow scope of the personnel exception. This case illustrates the inverse relationship between the specificity of a public body's documentation of its closed sessions and the public's perception of impropriety. Put another way, public bodies may avoid Open Meetings Act complaints by including in their closed-session documentation as much information as they can without disclosing properly-confidential matters. We note that the County Board has since taken steps to avoid future such violations.

OPEN MEETINGS COMPLIANCE BOARD

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